Washington University Journal of Law & Policy

Volume 57 *BRINGING SCIENCE TO LAW AND POLICY*

2018

Justice in the Jury: The Benefits of Allowing Felons to Serve on Juries in Criminal Proceedings

Sharion Scott
J.D. (2018) Washington University School of Law

Justice in the Jury: The Benefits of Allowing Felons to Serve on Juries in Criminal Proceedings

Sharion Scott*

INTRODUCTION

Imagine that you are incarcerated and on the verge of completing your sentence. You may be naturally inclined to believe that upon your release, you will re-enter society and be allowed to participate in basic rites of citizenship such as serving on a jury. While this seems like a reasonable assumption, in many places in America, you would be wrong. Under our current model of justice, a felony conviction or pleading carries with it consequences that can persist long after a felon cuts ties with the criminal justice system.[1] In American law before the middle of the twentieth century, this was referred to as civil death.[2]

Under common law civil death, any felony conviction carried with it the revocation of civil rights and exclusion from certain parts of society.[3] While civil death was a more formal process meant to signify that the person was dead to society, a remnant of the practice remains in our system today.[4] Presently, civil death persists in the form of "collateral consequences" that deny felons the right to participate in certain civil privileges and processes.[5] These consequences range from formal sanctions such as lack of voting rights and jury exclusion to less structured barriers like discrimination in hiring.[6]

---

* J.D. (2018) Washington University School of Law.

1. *See* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 153-54 (1999).

2. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PENN. L. REV. 1789, 1790 (2012).

3. *Id.* at 1793-94. In English common law, civil death consisted of:

> [A person being] placed in a state of attainder . . . and an extinction of civil rights, more or less complete, which was denominated civil death. Forfeiture was a part of the punishment of the crime . . . by which the goods and chattels, lands and tenements of the attainted felon were forfeited to the king . . . The blood of the attainted person was deemed to be corrupt . . . whereby . . . as stated by Chitty, "he is disqualified from being a witness, can bring no action, nor perform any legal function; he is in short regarded as dead in law."

Avery v. Everett, 18 N.E. 148, 150 (N.Y. 1888).

4. Chin, *supra* note 2, at 1799.

5. *See* Demleitner, *supra* note 1, at 153-54.

6. Demleitner, *supra* note 1, at 156-59; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW:

While certain civil penalties, such as disenfranchisement, have garnered significant activism in attempts to restore former felons' right to vote,[7] the issue of jury exclusion is less controversial for many.[8] Currently, thirty-one states and the federal government permanently exclude felons from serving on juries, whether civil or criminal.[9] Because the criminal justice system currently confines a significant proportion of the African American population, this removes a large number of black males and females from the jury selection pool.[10]

While certain policy reasons are asserted for why felons should not be allowed to serve on juries in criminal trials,[11] social and political considerations merit an opposite argument. The criminal justice system has a history of jury bias and an underrepresentation of minorities in key decisions.[12] Social science research has shown a tendency of white jurors to vote for a conviction of a black defendant in instances where a white defendant would be acquitted.[13] White jurors are also more likely to impose harsher penalties on black defendants.[14] Though there is an imperative for an increased presence of minorities on juries,[15] black jurors who are eligible for the *voir dire* process are regularly turned away from

---

MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 142-43 (2012).

7. *See generally*, Gabriel J. Chin, *Felon Disenfranchisement and Democracy in the Late Jim Crow Era*, 5 OHIO ST. J. CRIM. L. 329 (2007)(discussing the history of felon disenfranchisement and how this mirrors historical policies of racial exclusion of blacks).

8. *See* James Michael Binnall, *A Jury of None: An Essay on the Last Acceptable Form of Civic Banishment,* 34 DIALECT ANTHROPOLOGY 533 (2010); *see infra* notes 82-83 and accompanying text.

9. Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 150-58 (2003).

10. *See* ALEXANDER, *supra* note 6, at 6-7. "One in six black men had been incarcerated as of 2001. If current trends continue, one in three black males born today can expect to spend time in prison during his lifetime." *Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/criminal-justice-fact-sheet/ (last visited Nov. 18, 2016).

11. *See* Kalt, *supra* note 9, at 100-13.

12. *See generally* Sherri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (exploring the extent of jury bias in criminal trials and presenting ways to include more minorities on juries).

13. *Id.* at 1619-22.

14. *Id.* at 1622-23. *See also* DEATH PENALTY INFO. CTR., *Facts About the Death Penalty*, DEATH PENALTY INFO (Nov. 17, 2016), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (citing a study that found that "[j]urors in Washington state are three times more likely to recommend a death sentence for a black defendant than for a white defendant in a similar case.").

15. *See* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 880-81 (2012).

service through the use of measures like prosecutorial discretion and peremptory challenges.[16] With obvious juror racial bias against blacks and purposeful attempts to exclude blacks from jury service, there is an increasing need to enlarge the pool of citizens who are eligible for jury service.

An abundant supply of jurors, particularly blacks, can be created by removing barriers to jury inclusion and allowing felons to participate in the process.[17] Jury service should be open to felony offenders who have completed their sentence and desire to civically engage with society. They should be able to participate in *voir dire* in a manner similar to other citizens but with special safeguards against prosecutorial bias.[18]

This Note will trace the history behind jury bias, the exclusion of black jurors, the need to enhance opportunities for blacks to serve on juries, and how this relates to allowing felons to participate in the jury process.

Part I of the Note will begin with a discussion on the history of jury service in our nation, starting with the Sixth Amendment promise that every accused person has a right to a jury[19] and adding to it the idea of a jury drawn from a cross-section of one's peers.[20] This part will also present evidence of jury bias regarding minorities, how this is affected by disproportionate jury composition, and systemic factors that perpetuate the underrepresentation of minorities on juries.[21]

Part II will analyze the effects of relevant laws and case history that

---

16. *See* Sherri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993).

17. *See* Kalt, *supra* note 9, at 160-61.

18. Kalt, *supra* note 9, at 160-61.

19. U.S. CONST. amend. VI. The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Id.

20. Taylor v. Louisiana, 419 U.S. 522, 528 (1975). "[T]he number of persons on the jury should 'be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.'" *Id.* (quoting Williams v. Florida, 399 U.S. 78, 100 (1970)).

21. *See* Johnson, *supra* note 12.

have developed in this area. It will first consider the costs to society of continuing felon exclusion and weigh these detriments against the potential benefits of reform that would allow felon inclusion. This part will also rebut concerns associated with inclusion by presenting evidence that felons on juries can be unbiased and participate in a manner similar to other citizens.

Part III will argue that criminal rehabilitation, civic participation, and the integrity of the jury is best served by including felons on juries in criminal cases. It will present the idea of including offenders in the process of *voir dire* and letting prosecutors select or deny a person because of their answers and not their background.

I. HISTORY

A. The Jury as an Institution

The American jury system has distinguished itself from other judicial systems with a unique set of promises and systems for those who face criminal prosecution.[22] The Sixth Amendment guarantees the rights of criminal defendants, including the right to an impartial jury.[23] Scholars, both American and foreign, have championed the jury system as being a vital part of democracy designed to give heightened protection to the accused.[24] Justice Breyer even commended the criminal jury as the "conscience of the community" because the jury is more apt to represent the will of the people and community more than a single judge.[25]

---

22. *See* Duncan v. Louisiana, 391 U.S. 145, 152-58 (1968) (describing the development of the jury in America and its pivotal role in protecting the rights of men from oppressive forces).

23. *See* U.S. CONST. amend. VI.

24. *See* Honorable William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67 (2006).

25. Ring v. Arizona, 536 U.S. 584, 615-16 (2002)(Breyer, J., concurring). Breyer uses this phrase as part of his explanation for why juries are more equipped to impose the death penalty than a sole judge. Quoting several precedent cases, he writes:

> In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to "the community's moral sensibility," because they "reflect more accurately the composition and experiences of the community as a whole . . . ." Hence they are more likely to "express the conscience of the community on the ultimate question of life or death . . . ."

B. The Cross-Section Requirement

Because the jury serves an important role in criminal verdicts and sentencing, the composition of a jury is of the utmost importance to a defendant.[26] In *Taylor v. Louisiana*, the Supreme Court addressed the issue of whether defendants in a criminal trial are entitled to a fair and representative jury and what this means for jury selection and composition.[27] Drawing on its precedent from 1940 forward, the Court declared, "the selection of a petit jury[28] from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."[29] A cross-section of the community is key to criminal trials because a jury composed from various geographical areas and racial groups is better equipped to judge the gravity of community members' actions, more impartial to the defendant, and consistent with each citizen's duty and right to participate in the civil process.[30]

To challenge whether a cross-section of the community exists within a jury, the court articulated a test in *Duren v. Missouri*.[31] The defendant must show that (1) a group qualifying as distinctive, (2) is not fairly and reasonably represented in jury venires,[32] and (3) "systematic exclusion" in

---

Id. (quoting Spaziano v. Florida, 468 U.S. 447, 481 (1984) (Stevens, J., concurring in part and dissenting in part) and Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

26. *See generally* Johnson, *supra* note 12 (describing the ways white juror bias has affected black defendants and highlighting how this has compromised the promises of justice for people of color).

27. Taylor v. Louisiana, 419 U.S. 522, 526-30 (1975).

28. The term "petit jury" refers to a trial jury that is chosen to decide whether a defendant committed the crime as charged in a criminal case. This is in comparison to a grand jury that simply "determines whether there is 'probable cause' to believe the individual has committed a crime and should be put on trial." *Types of Juries*, UNITED STATES COURTS, http://www.uscourts.gov/services-forms/jury-service/types-juries (last visited Jan. 9, 2018).

29. Taylor v. Louisiana, 419 U.S. 522, 528 (1975); *see also* 28 U.S.C.A. § 1861 (West 2016).

30. Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975). Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial. The Court emphasizes that:

> Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [The] broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.

Id. (quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

31. Duren v. Missouri, 439 U.S. 357 (1979).

32. A venire panel is a group of prospective jurors summoned by the court. *Venire*, CORNELL

the jury-selection process accounts for the underrepresentation.[33] For the purposes of race, a defendant could show a lack of a fair cross-section through the use of statistical data comparing the composition of the venire panel to the makeup of the local community.[34] If a large disparity is apparent and the group has been systematically excluded, a court may find that the system denied the defendant the opportunity to a fair trial by jury.[35] Difficulty often arises, however, when defendants attempt to prove systematic exclusion among jurors.[36] The Court has given "broad discretion" to states to "prescribe relevant qualifications for their jurors and to provide reasonable exemptions."[37] Practically, this creates difficulties for defendants who cite hidden bias and other indirect methods of discrimination in jury selection.[38] These barriers to proving bias in composition and jury impartiality can be detrimental to a black defendant's argument that a majority white jury was biased in his proceeding.[39]

LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/venire (last visited Jan. 9, 2018).

33. *Id.* at 364. The full text of the opinion states:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id.

34. *See* Berghuis v. Smith, 559 U.S. 314, 330-31 (2010).

35. *Id.* at 531.

36. *See id.*

37. Taylor v. Louisiana, 419 U.S. 522, 537-38(1975).

38. *See* Berghuis v. Smith, 559 U.S. 314, 332 (2010). The defendant in *Berghuis* argued that the county systematically excluded blacks through county administrative methods:

> The County's practice of excusing people who merely alleged hardship or simply failed to show up for jury service, its reliance on mail notices, its failure to follow up on nonresponses, its use of residential addresses at least 15 months old, and the refusal of Kent County police to enforce court orders for the appearance of prospective jurors.

Id. The Court rejected the argument that these practices constituted sufficient proof of systemic exclusion, especially in light of state sovereignty in its procedures and jury requirements. *Id.*

39. *See generally* Johnson, *supra* note 12 (discussing the inefficacy of various techniques in eliminating racial bias in criminal trials).

C. Jury Bias

Although the Supreme Court and certain judges dispute whether a juror's race can affect jury decisions,[40] social science research shows a correlation between jury composition and sentencing of minority defendants.[41] Judges have hesitated to link discrimination to disparate outcomes because they want to avoid releasing a defendant they believe to be dangerous, are unable to imagine the effects an alternate juror may have had on the proceedings, or believe that it is unconstitutional or unwise to admit the effect juror race can have on verdicts.[42] Yet, studies have shown that race can affect outcomes in some cases and that judges have the ability to estimate the effect of race.[43]

Case studies, conviction rates, death penalty statistics, mock jury findings, and research on racial prejudice can be used to paint a picture of jury bias against black defendants by white juries.[44] Although each of the different types of data alone are incomplete and open to challenge, taken collectively, they paint a picture of juror bias based on race.[45] In studies on conviction rates, significant differences were found between jury guilty verdicts for black defendants and their white counterparts; this was true for majority white juries and also white and black judges.[46] For example, one study produced statistics showing that juries that have a larger number of blacks produce lower conviction rates than juries that are majority white.[47]

---

40. *See* Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993).

41. *Id.* at 99-100. The article describes the debate over juror discrimination and its effect on decisions. It outlines the argument that discrimination exists in such a way that judges have the ability to predict it and act in ways to counter its potential effects on defendants. *Id.* at 103-04.

42. *Id.* at 76. The author makes the argument that because of this reluctance by judges to view the situation in a more objective manner, they are unable to see the picture for what it clearly is: juror race and subsequent discrimination on defendants does have an effect on trial outcomes. Researchers are more able to ascertain this truth because they operate without the hesitation of judges mentioned above. *Id.*

43. *Id.* at 77.

44. *See* Johnson, *supra* note 12, at 1617-51; Roberts, *supra* note 15, at 835-37; King, *supra* note 40, at 77-100.

45. *See* Johnson, *supra* note 12, at 1617-51.

46. Johnson, *supra* note 12, at 1620-21.

47. Johnson, *supra* note 12, at 1620-21. In studies in both Baltimore and Los Angeles, experimentation with jury selection procedures produced significant differences in conviction rates. In Baltimore, one jury method yielded 70% whites and another method yielded 34%-47% blacks and the

On an individual level, lab studies of jury behavior showed that among both white and black jurors, each person was more likely to assign culpability to a person of a race other than his own.[48]

In addition to these overt patterns in juror behavior, research on racial stereotypes supports the idea of racial bias and provides a partial explanation for the phenomena described above.[49] One study highlights several stereotypes of blacks being associated with lower social and socioeconomic status, negative moral and personal traits, and untrustworthiness, including a higher propensity for violence, criminality, and culpability.[50] Even if a juror believes he or she is racially neutral and does not intend to stereotype or categorize a black defendant, implicit bias has been observed in participants at every level of criminal proceedings, including judges and attorneys.[51] With white jurors, this means that black defendants could be convicted on the basis of a subconscious bias

---

conviction rate differed from 84% to less than 74%. Similarly, in Los Angeles, when the city included more black and Hispanic jurors, the conviction rate fell from 67% in 1969 to 47.2% in 1971. Johnson, *supra* note 12, at 1621-22.

48. Johnson, *supra* note 12, at 1625-34. In this study, black jurors were likely to assign less culpability to black defendants and more to white defendants. White jurors behaved in a similar manner by determining black guilt at a rate higher than that of white guilt. Johnson, *supra* note 12, at 1625-34.

49. *See* Johnson, *supra* note 12, at 1617-51.

50. Johnson, *supra* note 12, at 1649. The article goes on to distinguish between people that overtly express negative stereotypes and those that internalize them but nonetheless act in a biased manner because of them.

> *Dominative* racists express their bigoted beliefs openly, frequently through physical force, while *aversive* racists do not want to associate with blacks but do not often express this feeling. Social scientists once described the aversive mode as characterizing the North and the dominative mode as characterizing the South, but now suggest that aversive manifestations of racism increasingly predominate in all parts of the country.

Johnson, *supra* note 12, at 1649.

51. Roberts, *supra* note 15, at 835-37. According to the article, implicit bias in criminal proceedings can do the following:

> Affect how jurors react to assertions that someone acted in self-defense[;] assertions that there was excessive force by the police[;] affect whether there really is a presumption of innocence . . . [;]whether the jury believes that remaining silent, which is a defendant's constitutional right, is an admission of guilt[;] and how the jury perceives an expert witness who is a person of color.

Roberts, *supra* note 15, at 837.

triggered by implicit negative associations or prior experiences.[52] Combining the high potential for jury bias with the large number of minorities in the criminal justice system, it is imperative that black defendants, who have a right to a jury composed of a cross-section of their peers, have more blacks on a jury to prevent bias and provide a fair trial.[53]

It is estimated that the criminal justice system currently incarcerates or supervises over thirteen million Americans, four or five million of whom are black. This signifies that "16% to 21% of the adult black population are felons, and that between 29% and 37% of the adult black male population are felons."[54] Though a disproportionate number of blacks are currently under the supervision of the criminal justice system,[55] and many black defendants have been subject to jury trials, a jury's composition is not always reflective of the black populace in that community.[56]

D. The State's Role in Creating Disproportionate Juries

Since the advent of slavery in America, state and federal governments have erected barriers at multiple levels of the criminal justice system to prevent black citizens from exercising their right to serve on a jury.[57] Reconstruction laws explicitly excluding blacks from juries were officially struck down by the Supreme Court in its 1880 decision *Strauder v. West*

52. *See* Johnson, *supra* note 12, at 1650-51.

53. *See* Johnson, *supra* note 12, at 1696-99.

54. Kalt, *supra* note 9, at 170 (citing Christopher Uggen et al., *Crime, Class, and Reintegration: The Scope and Social Distribution of America's Criminal Class,* Paper Delivered to the American Society of Criminology 17, Nov. 18, 2000). The authors of this paper compiled these numbers by starting with the number of each year's cohort of released felons, subtracting the estimated number of recidivists and death, and aggregating the cohort into a grand total. The federal government has a different view of these numbers and estimates that the number "in jail, in prison, on parole, or on probation—a count that includes misdemeanants—in 2001 at 6.6 million." Kalt, *supra* note 9, at 170 n.498 (citing Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2001, at 494 tbl. 6.23 (2002)) (providing incarceration rates from 1925 to 2001).

55. *See* Kalt, *supra* note 9, at 170. The term supervision includes statistics of those currently incarcerated, those released on parole, and those on probation. Kalt, *supra* note 9, at 170 n. 498.

56. *See* ALEXANDER, *supra* note 6, at 193-94; Adam Liptak, *Exclusion of Blacks From Juries Raises Renewed Scrutiny*, N.Y. TIMES (Aug. 16, 2015), http://www.nytimes.com/2015/08/17/us/politics/exclus
ion-of-blacks-from-juries-raises-renewed-scrutiny.html?_r=0.

57. *See* ALEXANDER, *supra* note 6, at 119-23.

Virginia.[58] Yet, de facto exclusion of blacks from jury service continued through the use of intimidation, local discretionary policies, and other barriers to black jury participation.[59] Furthermore, despite its ruling in *Strauder* that a defendant of one race should not have to face a panel of jurors from which his race has purposefully been excluded,[60] the Supreme Court consistently upheld convictions of black defendants by all-white juries.[61] The Court reasoned that explicit exclusion of a particular group violates equal protection, however, "the Court allowed states to discriminate in selecting juries by de facto means, such that states could discriminate as to who could serve on a jury in a manner that would adversely affect African Americans, without violating the Equal Protection Clause of the Fourteenth Amendment."[62]

One of the most pervasive sources for state exclusion of jurors is prosecutorial discretion in jury selection and peremptory strike.[63] In *Swain*

58. Strauder v. West Virginia, 100 U.S. 303, 308-09 (1880) (stating that the exclusion of blacks from jury service was "practically a brand upon them, affixed by law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to . . . equal justice").

59. Gunnar Myrdal describes the use of intimidation in the Jim Crow South:

> If there is a deficiency of legal protection for Negroes, white people will be tempted to deal unfairly with them in everyday affairs. They will be tempted to use irregular methods to safeguard what they feel to be their interests against Negroes. They will be inclined to use intimidation and even violence against Negroes if they can count on going unpunished. When such patterns become established, the law itself and its processes are brought into contempt, and a general feeling of uncertainty, arbitrariness and inequality will spread.

GUNNAR MYRDAL, AN AMERICAN DILEMMA 524 (1944). Potential black jurors were and continue to be excluded through means such as carefully drawn jury pools and selective procedures for how summonses are issued, such as issuing them only to registered voters or citizens with driver's licenses. ALEXANDER, *supra* note 6, at 121.

60. Strauder v. West Virginia, 100 U.S. 303, 309 (1880) (asking "[h]ow can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of his color alone, however well qualified in other respects, is not a denial to him of equal protection?")

61. *See* ALEXANDER, *supra* note 6, at 120; Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401 (1983).

62. Amanda L. Kutz, *A Jury of One's Peers: Virginia's Restoration of Rights Process and Its Disproportionate Effect on the African American Community*, 46 WM. & MARY L. REV. 2109, 2118 (2005).

63. *See* ALEXANDER, *supra* note 6 at 121; Lance Salyers, *Invaluable Tool vs. Unfair Use of Private Information: Examining Prosecutors' Use of Jurors' Criminal History Records in Voir Dire*, 56 WASH. & LEE L. REV. 1079 (1999)(discussing prosecutors' use of criminal records to attack prospective jurors during *voir dire*).

v. Alabama, the Supreme Court upheld the right of prosecutors to strike black jurors for "acceptable considerations" as long as the prosecutor did not systematically strike blacks from every trial.[64] "Over the next twenty years, no lower court found that the *Swain* standard had been satisfied."[65] Courts denied claims based on evidence of prosecutors repeatedly striking black jurors and deemed it "inappropriate to present as evidence only those cases involving black defendants."[66] Under this framework, the justice system didn't acknowledge the violation of black defendants' rights under the Equal Protection Clause because of racial discrimination in jury selection.[67] There was even less recognition of the manner in which jurors' rights were violated by such discrimination.[68]

The Supreme Court finally revisited the issue of prosecutors' discriminatory use of peremptory strikes in the case *Batson v. Kentucky*.[69] In *Batson*, a black defendant appealed his conviction, challenging the prosecutor's use of peremptory strikes against all of the black prospective jurors.[70] Revisiting the premise of *Strauder*,[71] the Court declared that prosecutors are forbidden from challenging prospective jurors solely on the basis of his or her race or the assumption that a black juror would not be impartial to the State's case.[72] The Court also created a framework for a

64. Swain v. Alabama, 380 U.S. 202, 221-23 (1965)(stating that "[w]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge.").

65. Johnson, *supra* note 16, at 28.

66. Johnson, *supra* note 16, at 29; Johnson, *supra* note 12, at 1658.

67. *See* Johnson, *supra* note 12, at 1658-59.

68. *See* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992)(noting that many challenges to discrimination in the use of peremptory strikes are viewed through the lens of the criminal defendant, but little attention is given to the right of the juror being excluded).

69. Batson v. Kentucky, 476 U.S. 79 (1986).

70. *Id.* at 82. The defense moved to discharge the jury on the grounds that the removal of all blacks violated the defendant's Sixth and Fourteenth Amendment right to a jury drawn from a cross section of the community. The judge denied the motion, stating that "the parties were entitled to use their peremptory challenges to 'strike anybody they want to.'" *Id.* at 83.

71. *See supra* notes 58-60 and accompanying text.

72. Batson v. Kentucky, 476 U.S. 79, 89 (1986).The Court went on to state the following: "[T]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black

defendant to establish a prima facie case of purposeful discrimination in the selection of the jury.[73] Despite the solidification of this safeguard, prosecutors continued to use peremptory strikes in a discriminatory manner but passed the *Batson* test by providing race-neutral explanations.[74] In *Purkett v. Elem*,[75] the Court took its lenient approach to prosecutor discretion even further by ruling that the prosecutor's reason for striking a juror does not have to be "persuasive, or even plausible," as long as no "discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[76]

E. The Exclusion of Felons

In addition to de facto exclusion of minorities from the jury pool, many modern day laws limit or forbid the inclusion of former felons on juries,

---

persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87.

73. *Id.* at 96. The Court articulated the standard as follows:

> [T]he defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id.

74. ALEXANDER, *supra* note 6, at 121. Alexander notes the following:

> [C]ourts accept explanations that jurors are too young, too old, too conservative, too liberal, too comfortable, or too uncomfortable . . . . Even explanations that might correlate with race, such as lack of education, unemployment, poverty, being single, living in the same neighborhood as the defendant, or proof of involvement with the criminal justice system—have all been accepted as perfectly good, non-pretextual excuses for striking African Americans from juries.

ALEXANDER, *supra* note 6, at 121-22.

75. Purkett v. Elem, 514 U.S. 765 (1995).

76. *Id.* at 768. ALEXANDER, *supra* note 6 at 122-23. *See also Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE 16-17 (2010), http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf. (describing some race-neutral reasons to exclude: low intelligence, low education, receives food stamps, from a high crime area, and having a child out of wedlock). Despite the fact that many of these reasons can be correlated with minority status, judges have upheld them in the past. *Id.*

eliminating a large number of blacks that have the potential to serve.[77] There are two main approaches to jury exclusion: either a lifetime ban, or restoration at some point and under particular circumstances.[78] Thirty-one states and the federal system currently have a lifetime ban for convicted felons.[79]

Ten states . . . exclude felons during the time that they are under sentence, under the supervision of the criminal justice system, or in prison;" three states "allow parties to challenge felons for cause for life at the discretion of the court;" five states "provide hybrids of various severity, either providing different rules for different situations, or using a rule combining penal status and some term of years;" and two states place no restrictions on felon jury service. Hence, while divergent statutory schemes comprise a "patchwork" of standards, an overwhelming majority of jurisdictions banish felonious jurors for life.[80]

With the majority of jurisdictions permanently removing felons' right to participate in the jury process, several policy reasons have been offered as justifications for sustaining the prohibition.[81]

F. Rationale for Exclusion

Brian Kalt describes the four main policy reasons for felon exclusion from juries as "history, maintaining probity, maintaining impartiality, and reliance on the clemency process."[82] Jury exclusion is a long-standing tradition in the history of our country and European predecessors, with exclusion occurring formally since 1410 and informally for centuries longer.[83] Despite the persistence of the tradition, modern changes in

77. Kalt, *supra* note 9, at 67. "Thirteen million people, including about thirty percent of black men, are banned for life from jury service because they are felons." Kalt, *supra* note 9, at 67; *see also* Am. Bar Ass'n, *Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, 9 n. 6 (2013), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_collateral_toc.html.

78. James M. Binnall, *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool*, 73 ALB. L. REV. 1379, 1385 (2010).

79. *Id.*

80. *Id.* (quoting Kalt, *supra* note 9, at 150-58).

81. *See* Binnall, *supra* note 78 at 1385-86; Kalt, *supra* note 9, at 100-13.

82. Kalt, *supra* note 9, at 100.

83. Kalt, *supra* note 9, at 100-01. "For grand juries, felon exclusion dates back to the Assize of

expectations for jury composition and the relevant felon population challenge the practice's contemporary viability.[84] For example, jury participation has broadened since the establishment of jury exclusion in America, evolving to include women, minorities, and other populations that were historically foreclosed from the process.[85] Also, while felon exclusion centuries ago was exercised within a criminal justice system that only incarcerated a small number of persons, the modern-day explosion of the prison population affects a larger number of American citizens.[86] These political and social developments surrounding juror exclusion suggest that the system has changed over time, and the rationale that history begets best practice is no longer sufficient to continue to exclude felons.[87]

The main justification for excluding jurors is that former criminals will affect the probity of the jury, either because the individuals themselves are "bad" or the stigma associated with their status will taint the integrity of the jury.[88] This rationale is flawed: the system does not protect probity by excluding felons when the participation of non-felons on juries has similar potential to taint the process.[89] The probity argument also naturally relies on blind assumptions. One assumption is that it equates a felony conviction with a sign of an intrinsic character flaw.[90] It also relies on the

---

Clarendon in 1166 and, in more specific form, to a 1410 statute of Henry IV." Kalt, *supra* note 9, at 100-01.

84. Kalt, *supra* note 9, 100-02.

85. Kalt, *supra* note 9, 100-01.

86. Kalt, *supra* note 9, at 101-02.

87. Kalt, *supra* note 9, at 100-02. Oliver Wendell Holmes said:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. After all, one could argue just as easily for the exclusion of female jurors because a jury has always meant "twelve good men and true." Indeed, women were not allowed to serve as jurors in every state until 1966, which was decades after women achieved suffrage. But women's place in America has changed, as have the places of juries and felons.

Kalt, *supra* note 9, at 100-02; *See also* MICHELLE ALEXANDER, *supra* note 6.

88. Kalt, *supra* note 9, at 100-02; *see also* United States v. Foxworth, 599 F.2d 1, 4 (1st Cir. 1979) (holding that felon exclusion "is intended to assure the 'probity' of the jury" is rationally based).

89. Kalt, *supra* note 9, at 103-04.

90. Paula Z. Segal, *A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York*, 13 N.Y. CITY L. REV. 313, 355-56 (2010).

assumption that a person's character will never change, and that good character is a requirement for understanding the public good.[91]

A parallel justification for felon exclusion is that former felons would have a tendency to be biased in the decision-making process, and would distort jury deliberations and verdicts.[92] The felon will either be hostile toward the government and side with defendants, or be antagonistic to the system that had convicted them and therefore be resistant to sentencing others to a similar fate.[93] To prevent such bias altogether, the system automatically excludes all felons, but it does not handle other potentially biased persons in a similar manner.[94] Victims of crime and their family members, for instance, have a tendency to be more biased toward criminal defendants, especially when the crime is similar to what happened to them, but these prospective jurors are not unilaterally excluded. They are handled on a case-by-case basis through the use of *voir dire*, the judge removing them for cause, or a prosecutor using a peremptory strike.[95] If other potentially biased citizens are allowed to go through the jury selection process and be screened out, former felons should be treated similarly. This is especially true because the policy operates on an assumption that may be inaccurate: all felons are not inherently biased.[96] There are examples of felons actually being partial to the government's case in a criminal trial, wanting to please the prosecutor if the person is on parole or probation, having a jaded perspective on actual innocence, or enacting a desire to prove himself as impartial.[97]

Those who recognize some of these inconsistencies acknowledge certain felons may deserve to serve on a criminal jury, but they believe that the clemency process is better equipped to deal with this than blanket inclusion of all former felons.[98] Under the clemency argument, those

91. *Id.*

92. Kalt, *supra* note 9, at 105-08; *see also* United States v. Greene, 995 F.2d 793, 797 (8th Cir. 1993) (holding that having jurors with a history of criminal charges is "'incompatible with [the] significant [governmental] interest,' of having jurors who 'can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.'").

93. Kalt, *supra* note 9, at 105-08.

94. Kalt, *supra* note 9, at 105-08.

95. Segal, *supra* note 90, at 355.

96. Kalt, *supra* note 9, at 106.

97. Kalt, *supra* note 9, at 106.

98. Kalt, *supra* note 9, at 108-10.

felons who desire to serve on a jury can use their state's process to apply for a special exception. This would allow the most adamant and deserving felons the opportunity to attempt *voir dire*, but would continue to exclude the majority of offenders that may not be fit for service because of a number of factors mentioned above.[99] The issue with this approach, however, is that the clemency process is difficult to navigate so that only a small number of former felons actually utilize it, and of those who do, an even smaller number actually have their requests granted.[100] Kalt opines that because of these persistent difficulties, in lieu of allowing individuals to obtain clemency, former felons should not be subject to blanket exclusion at all.[101]

G. Rulings and Findings on Felon Exclusion

Several court decisions and a presidential commission have also acknowledged that felons are not inherently biased or unfit to be included on juries. In *Miller*,[102] *Boney*,[103] and *Humphreys*,[104] courts upheld convictions of criminal defendants who contested their jury verdicts because of the presence of felons.[105] The courts relied on precedent[106] to hold that convictions should only be overturned if there is evidence of juror bias or lack of an impartial jury.[107] One decision espoused the view

99. Kalt, *supra* note 9, at 108-10.

100. Kalt, *supra* note 9, at 108-10.

101. Kalt, *supra* note 9, at 108-10.

102. People v. Miller, 759 N.W.2d 850 (Mich. Sup. Ct. 2008).

103. United States v. Boney, 977 F.2d 624 (D.C. Cir. 1992).

104. United States v. Humphreys, 982 F.2d 254 (8th Cir. 1992).

105. The federal law applied in *Boney* and *Humphreys* required that in order to exclude felons, defendants must affirmatively invoke the right. United States v. Boney, 977 F.2d 624, 633 (D.C. Cir. 1992) (quoting United States v. Uribe, 890 F.2d 554, 561 (1st Cir. 1989)). The defendant would have to make this assertion either before *voir dire* or within seven days of discovery of the grounds for the assertion. 28 U.S.C.A. § 1867 (West 2016). In *Miller*, the defendant asserted that the felon juror was prejudiced against him. 759 N.W.2d 850, 853 (Mich. Sup. Ct. 2008). In *Boney*, the defendant argued that the felon on his jury created an impartial panel in violation of the Sixth Amendment. 977 F.2d 624, 628 (D.C. Cir. 1992). In *Humphreys*, the defendant asserted that the selection process was improper because jurors were supposed to be excluded under federal law. 982 F.2d 254, 260-61 (8th Cir. 1992).

106. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984).

107. United States v. Boney, 977 F.2d 624, 632 (D.C. Cir. 1992); People v. Miller, 759 N.W.2d 850, 856-57 (2008).

that "felon status, alone, does not necessarily imply bias,"[108] and the other cases found that the former felons did not exhibit bias or partiality.[109]

In a 1967 report, a presidential commission found that there was little reason to permanently disqualify all felons from jury service.[110] Instead, the report espoused several different approaches that jurisdictions could take to integrate felons into the jury process.[111] The main recommendation was that the parties and judge in the case should control felon exclusion since they are in the best position to evaluate the potential jurors' fitness.[112] The judge could have discretion to bar a felon based on his conviction's connection to the case, and legislatures could also have the power to prescribe certain convictions as grounds for dismissing a juror.[113] The commission hoped that by utilizing some or a combination of these suggestions, states would have the power to improve the criminal justice system.[114]

II. ANALYSIS

Combining the intended purpose of the jury with the current judicial and social context, the benefits versus harm of including felons in the jury pool become apparent. Felon exclusion harms criminal defendants, the integrity of the jury, and the criminal justice system.[115] While felon inclusion presents notable benefits for the latter and has the potential to

108. United States v. Boney, 977 F.2d 624, 633 (D.C. Cir. 1992) (declaring that "the Sixth Amendment right to an impartial jury similarly does not require an absolute bar on felon-jurors").

109. People v. Miller, 759 N.W.2d 850, 860 (Mich. Sup. Ct. 2008) (finding that a juror's felon status did not affect his deliberations and he did not try to improperly influence other jurors); United States v. Humphreys, 982 F.2d 254, 261 (8th Cir. 1992) (holding that "there was no evidence of either bias or unfairness as a result of the seating of this juror.").

110. Kalt, *supra* note 9, at 142-43 (citing Task Force on Corrections, The President's Comm'n on Law Enforcement and Admin. of Justice, Task Force Report: Corrections 91 (1967)).

111. Kalt, *supra* note 9, at 142-43.

112. Kalt, *supra* note 9, at 142-43 Another recommendation suggested that legislatures could create disqualification for certain offenses for a set number of years. Kalt, *supra* note 9, at 142-43

113. Kalt, *supra* note 9, at 142-43

114. Kalt, *supra* note 9, at 142 n.346 (describing the Commission's purpose as "analyzing the American corrections system in 1967 and recommending future changes").

115. *See generally* Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592 (2013)(discussing the harms of felon exclusion and justifications for modifying the system to include felons).

strengthen both the black community and society in general.[116]

A. Ineffective Juries

One of the most striking effects of jury exclusion is the racial disparity created in jury representation of minorities. A current theory is that felon exclusion reduces the participation of black males on juries by approximately thirty percent.[117] With the criminal justice system overseeing a quarter to a third of the black male population,[118] the exclusion of such a high number of black males raises the question of whether black defendants truly receive a jury composed of a "cross-section" of their peers.[119] In fact, one scholar suggests that felon exclusion is often used as a form of racial discrimination against blacks to purposefully exclude them from juries where they may be sympathetic to black defendants.[120]

Lack of black juror representation on juries trying black defendants is particularly dangerous in light of racial bias among white jurors.[121] The promise of an impartial jury can scarcely be upheld if the majority of people trying a defendant may hold conscious or unconscious bias against the defendant.[122] In order for the large number of black defendants in the criminal justice system to receive fair trials, there must be an increased presence of black males in the jury pool.[123] In accord with this concept, the American Bar Association has highlighted the importance of a jury that represents the population rather than upholding the tradition excluding felons from juries.[124]

---

116. *Id.*

117. Kalt, *supra* note 9, at 113-14.

118. *See supra* note 54 and accompanying text.

119. *See supra* notes 26-39 and accompanying text.

120. Roberts, *supra* note 115, at 602-05.

121. *See supra* notes 12-15 and accompanying text. Roberts, *supra* note 115, at 604 (noting studies that show that the whiter the jury, the more likely it is to convict people of color).

122. *See supra* notes 13-14 and accompanying text.

123. S. David Mitchell, *Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community*, 34 FORDHAM URB. L.J. 833, 858 (2007). The author notes that the Supreme Court in *Batson* stated that proportional representation is not necessary to create a fair jury, but the lack of peers in a potential pool of jurors creates such a great bias against a defendant that even *voir dire* would be incapable of creating a fair jury. *Id.*

124. Segal, *supra* note 90, at 326-27 (citing American Bar Ass'n, The ABA Principles for Juries

Categorically excluding large numbers of potential jurors based on past felony convictions also creates the risk of hindering juries in delivering informed, unbiased, and well-reasoned verdicts.[125] Diversity of experience has the power to shape the jury's interpretation of events, and felons have a unique experience to bring to the jury.[126] For a jury that is tasked with judging criminal matters, felons who have knowledge of the workings of the criminal justice system have the potential to provide unique insight that would otherwise be inaccessible to laypersons.[127] Former felons, for example, could inform unaware jurors about the plea bargaining process and the pressure put on defendants to make a guilty plea even in the absence of guilt.[128]

B. Ineffective Reintegration

Felon exclusion also serves to thwart society's purported goal to reintegrate felons back into society upon release from confinement.[129] The

---

and Jury Trials 8 (2004), http://www.abanet.org/juryprojectstandards/The_ABA_Principles_for_Juries_and

_Jury_Trials.pdf). The ABA recommended that "only those who have been convicted of a felony and are in actual confinement or on probation, parole, or other court supervision be excluded." Segal, *supra* note 90, at 326-27.

125. *See* Roberts, *supra* note 115, at 605-07.

126. Roberts, *supra* note 115, at 605-07.

127. Roberts, *supra* note 115, at 605-07.

128. Roberts, *supra* note 115, at 605-07. Further examples of the perspective felons could potentially bring to juries include: understanding forced confessions and why a defendant would admit guilt if he was innocent and coming to terms with corruption among police and prosecutors. Roberts, *supra* note 115, at 605-07.

129. Roberts, *supra* note 115, at 610. The author differentiates between reentry and reintegration. She quotes Michael Pinard in saying that:

> The terms 'reentry' and 'reintegration' tend to be used interchangeably in this context. However, some have observed these to be distinct concepts. For instance, one commentator observes that reentry is the process by which an ex-offender leaves confinement and returns to his or her community, while reintegration is the ultimate goal.

Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1084 n.71 (2004)(citing Jeremy Travis, Address at the University of Maryland School of Law (Sept. 8, 2003)). Kutz notes the paradox between having both a social goal of reintegration and policies for exclusion: "The rationale for the exclusion of felons from juries stems from the belief that felons are less trustworthy and would be unable to administer the law fairly. However, this view is inconsistent with the idea of reintegration and rehabilitation, both of which are interests of the state." Amanda L. Kutz, *A Jury of One's Peers:*

hindrance to reintegration is two-fold: (1) removing felons from civic participation and (2) sending negative messages about individuals who are excluded because of a felony conviction.[130] By removing opportunities to participate in civic processes such as jury service, felons may be discouraged in their attempts to reclaim their role in society and may withdraw back into an anti-social life of crime.[131] Further, excluding felons from jury service also sends a message o the felon being an outsider who does not belong.[132] Such a message can be antithetical to the goal of making felons feel welcome in society and also reinforces the attitude amongst citizens that former felons should be treated as "others."[133]

C. The Promise of Civic Participation

Felons stand to benefit greatly and would have a higher chance of successful reintegration if we remove barriers to jury inclusion.[134] The value of jury service for citizens is tri-fold: it is educative, democratic, and allows for dialogue.[135] In particular, serving on a jury "teaches jurors about life and law, engages them in self-government, and forces them into a serious civic interchange with their fellows."[136] By serving on a jury, felons would learn first-hand lessons about real-life conflicts, equity, and how democratic systems are intended to work.[137] Jury service would make

---

Virginia's Restoration of Rights Process and Its Disproportionate Effect on the African American Community, 46 WM. & MARY L. REV. 2109, 2135 (2005).

130. *See* Roberts, *supra* note 115, at 610.

131. Jeremy Travis et al., *Prisoner Reentry: Issues for Practice and Policy*, 17 CRIM. JUST. 12, 17 (2002).

132. *See* Roberts, *supra* note 115, at 611.

133. Roberts, *supra* note 115, at 611-12. Roberts says that for this reason, "legislation in this area plays a part in confirming anti-reintegrative stereotypes rather than seizing the opportunity to shift prejudices by showing people in a new role: that of civic participant." Roberts, *supra* note 115, at 613.

134. *See* Kalt, *supra* note 9, at 128-30. "In 2006, a Colorado court reasoned that a state statute that allowed those with felony-conviction histories to serve on petit juries was rationally related to the legislative purpose of rehabilitating convicted felons and reintegrating them into society once their punishment was complete." Segal, *supra* note 90, at 326 (citing People v. Ellis, 148 P.3d 205, 210 (Colo. App. 2006)).

135. Kalt, *supra* note 9 at 128-30.

136. *Id.* at 324; *see also* Kalt, *supra* note 9, at 128-30; *see also* Roberts, *supra* note 115, at 611 (noting that "One of the types of activity that has been found to aid the possibility of reentry is civic participation.").

137. *See* Kalt, *supra* note 9, at 128-29. Kalt pulls these ideas from Alexis de Tocqueville's description of the American jury system as "a gratuitous public school". ALEXIS DE TOCQUEVILLE,

felons full participants in the democratic process by allowing them to make a difference in their community and promote greater respect for the criminal justice system.[138] Finally, felons serving on juries would also help facilitate a dialogue between jurors that could lead to the enhanced effectiveness of the jury[139] and expose felons to viewpoints that are different from their own.[140]

D. Outdated Justifications

The most common argument against felon inclusion is that those convicted of felonies will destroy the probity of the jury.[141] Yet, the inclusion of non-felons with "bad" character belies the argument that felon exclusion is effective in keeping out "bad" apples.[142] It is a fair assumption that non-felon, "bad apple" jurors exist and have just as much potential to affect probity as former felons. Thus, there is a serious question of whether jury exclusion necessarily maintains probity. In the instance that we doubt this connection, the probity justification seemingly fails.[143]

Bias is also often asserted in opposition to including felons on juries.[144] Yet, these assertions fail to take into account the fact that bias is present in other potential jurors,[145] the system is procedurally designed to weed out such bias,[146] and attributing negative feelings towards the justice system to

---

DEMOCRACY IN AMERICA 226-27 (Bruce Frohnen ed., Henry Reeve trans., Anchor Books 2002)(1835).

138. *See* Kalt, *supra* note 9, at 128-29. "There is modern empirical evidence suggesting that people who have served on juries believe that they have benefited from that service and that they have more respect for the courts than people who have not served on juries." *See* Segal, *supra* note 90, at 326 (citing Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 467 (2004)).

139. *See supra* notes 126-128 and accompanying text.

140. *See* Kalt, *supra* note 9, at 128-29. Kalt espouses the idea that felons who serve on juries will encounter a variety of people that will look at the world differently and will learn to work with people from varying backgrounds. Kalt, *supra* note 9, at 128-29.

141. *See* Kalt, *supra* note 9, at 102-04. *See supra* notes 88-89 and accompanying text.

142. *See* Kalt, *supra* note 9, at 102-04. *See supra* note 89 and accompanying text.

143. *See supra* note 89 and accompanying text.

144. *See supra* note 92 and accompanying text.

145. *See supra* notes 94-96 and accompanying text.

146. *See* Kalt, *supra* note 9, at 111-16. Kalt asserts that *voir dire* is designed to allow litigators to get at potential juror bias and uncover events in the juror's background that would taint their ability to be impartial. Kalt, *supra* note 9, at 112-13.

every felon is a gross overgeneralization.[147] As evidence that all felons are not biased, Kalt references court cases such as *Boney, Humphreys,* and *Miller*, in which courts upheld defendants' convictions despite challenging their convictions on the basis of having had a felon on their respective juries.[148] The courts in these cases all emphasized that as long as the felon juror was impartial and did not exhibit bias against the defendant, the verdict did not warrant overturning.[149] If multiple courts can find that all felons are not biased and individual determination of their fitness for jury service is warranted, then other jurisdictions should be capable of such an approach as well.

IV. PROPOSAL

The common law referred to the collateral consequences of criminal conviction as "civil death" for a reason. Excluding felons from juries based on notions of jury integrity and unsupported felon typecasting only results in irreversible harm to those subject to the criminal justice system, their communities, and society at large. Society would benefit more if we found a way to incorporate felons into the jury process, and henceforth the criminal justice system, in a positive rather than negative manner. This would serve to maximize the effectiveness of the jury, facilitate the reentry of felons into society, and increase trust in the criminal justice system.

One way to reduce recidivism and correct behaviors that harm society is to rehabilitate offenders.[150] True rehabilitation, however, would require felons to transition back into a society that treats them as individuals capable of being judged on their own merits rather than being limited by a state-imposed status. It would also be dependent upon opportunities being provided for those felons to learn and exhibit behaviors of an active citizen.[151] Jury inclusion would serve these purposes as well as create a

147. *See* Kalt, *supra* note 9, at 75.

148. *See supra* notes 102-108 and accompanying text.

149. *See supra* notes 102-108 and accompanying text.

150. James Gilligan, Opinion, *Punishment Fails. Rehabilitation Works.* N.Y. TIMES (Dec. 19, 2012), http://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-reha

bilitation-works. He espouses the idea that people learn by example so we will best help them transition back into society by helping them change their behavior to something that is constructive.

151. *See* Kalt, *supra* note 9, at 128-30.

reason for felons to be invested in an equitable criminal justice system and a prospering community.

Because of juror bias, discriminatory exclusion of minorities from juries, and flaws in other areas of the selection process, many members of the community have developed distrust for the criminal justice system and the jury in particular.[152] For blacks especially, a long history of exclusion creates a feeling of being both closed out of the process and victimized by those who are allowed in.[153] To remedy the defects in the jury and increase community confidence in our system, we should seek out sources to add diversity of race, culture, and experiences to juries that adequately represent the communities from which they are selected. Felon inclusion would support this by introducing a large number of blacks that are currently excluded because of their criminal records. This change would not only provide unique insight into the workings of the system, but it would increase fairness for minorities and those who are being judged by panels.

While concerns rightfully exist about felons tainting the decision-making process or affecting the integrity of the jury, it must be kept in mind that the same concerns exist with citizens who are non-felons. Every day there are people who are biased, prejudiced, or deficient in moral fiber that serve on juries. If we trust the juror selection process to choose between the biases of non-felons, we can likewise trust it to screen felons who may, in quite a few cases, have fewer biases than these non-felons.

Felons should thus be included in the jury process to the greatest extent possible. However, because they are a heavily stigmatized population, their inclusion warrants the creation of a special system that would strike a balance between addressing the concerns of critics, while protecting former felons' right not to be discriminated against because of status. First, felons should be allowed to go through *voir dire* in the same manner as non-felons. They should be asked the same questions with the exception of one;[154] neither side in the case will be allowed to ask if the person has a

---

152. *See* ALEXANDER, *supra* note 76 and accompanying text; see also Underwood, *supra* note 68 at 748-49.

153. *See* ALEXANDER, *supra* note 76 and accompanying text.

154. Sample questions include the following:

If you were my client, would you be completely comfortable having you as a juror on this

criminal record. This would allow parties to screen for bias or issues in the person's background that hinders impartiality, but it would not disadvantage him because of a criminal background. Criminal convictions would only be revealed if the individual were selected to be on the jury panel. Then, the judge will consider the nature of the person's crime and the actions at issue in the trial and strike the juror for cause only if he finds there is serious potential for bias or prejudice against either side in the case.

To guard against any leaks of a criminal conviction to counselors conducting *voir dire*, judges would highly scrutinize any peremptory challenges. Judges would only be allowed to dismiss a potential juror if litigators can articulate a legitimate barrier to the person being an unbiased juror, and the judge would hold the prosecutors to a standard higher than that of *Batson*.[155] Prosecutors would have to articulate a reason for striking the felon that is not just plausible, but also persuasive. This would be one of the only guarantees that prosecutors would not use current "race neutral" language to justify strikes that are in fact racially discriminatory.[156]

If prosecutors or other court officials protest that too much leniency is provided to felons at the expense of protections for the jury system, one could easily point to multiple facets of the proposed process that provide continued safeguards against bias or prejudice. First, the *voir dire* process would continue to work in the exact same manner and would presumably weed out any bias that is a result of the person's character or perspective. If the person is chosen, it can be assumed that there is no blatant prejudice, so felon status should not have been relevant. Second, the judge-conducted

---

> case? Can you think of anything in your own life that reminds you of this case? What and how? Is there anything that you have seen or heard that would make it hard for you to guarantee to judge my client the same as the other side? Is there anything you'd prefer to discuss in private? Is there anything we haven't asked you that you think we should know?

5 Questions to Ask in Voir Dire . . . Always, THE LITIGATION CONSULTING REPORT (July 12, 2013), http://www.a2lc.com/blog/bid/66094/5-Questions-to-Ask-in-Voir-Dire-Always. These questions would serve the interest discussed below of screening for jury bias and impartiality.

155. *See supra* notes 75-76 and accompanying text. As discussed above, the plausible standard allows for prosecutors to articulate even the most trivial reasons to strike a juror, and courts will uphold the prosecutor's discretion if the true reason was discriminatory. Using a persuasive standard would prevent such abuses.

156. *See* ALEXANDER, *supra* note 76 and accompanying text.

review process for felons would ensure that any bias resulting from the nature of the felon's conviction would be adequately assessed and the potential juror could be excluded if the judge thought it was necessary on the basis of the past felony conviction. With this multi-layered process, litigators could still use their normal methods of selection but be ensured that no additional bias would result from inclusion of a felon on the jury.

CONCLUSION

Felons deserve the right to participate in the *voir dire* process with the rest of society. If we as a democracy want to further the goals of citizenship, self-development, and a fair criminal justice system, former felon inclusion in jury service is not just recommended, but critical.[157] We must allow these individuals to go through the jury selection process in a manner similar to other individuals because it increases diversity, ensures more impartiality and less bias, and serves the goal of reintegration of felons back into society.[158]

Further, felon inclusion works to secure the promise of our justice system that all criminal defendants will be tried by an impartial jury.[159] Impartiality is difficult to obtain if individuals are denied a panel of their peers based on race, sex, religion, or other indicators unrelated to a potential juror' fitness for jury service.[160] Felons, as much as other groups, have a distinct perspective and story to bring to juries and can learn a great deal from their jury experiences.[161] If we want our criminal justice system to work for us, including these individuals needs to become a priority.

157. *See* Kalt, *supra* note 9.
158. *See* Roberts, *supra* note 115.
159. *See* Segal, *supra* note 90.
160. *See* Segal, *supra* note 90.
161. *See* Kalt, *supra* note 9.